



**JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT
COMMITTEE
January 9, 2018
Room 643**

The Joint Legislative Administrative Procedure Oversight Committee (APO) met on Tuesday, January 9th, 2018 at 1:00 PM. The meeting was held in Room 643, Legislative Office Building. Members present were: Representatives Jordan, Floyd, Destin Hall, Hardister, and Senators Wells, Barrett, Blue, Daniel, Randleman, and Robinson. Staff present were Jeff Hudson, Jeremy Ray, and Jason Moran-Bates, and Emma King and Linda Wentz as committee clerks.

Representative Jonathan Jordan presided.

The meeting of the Joint Legislative Administrative Procedure Oversight Committee was called to order by Representative Jonathan Jordan, Co-Chair, at 1:08 PM. He recognized the Sergeant at Arms Terry Edmundson and Frances Patterson from the Senate and Bill Bass, David Leighton, and Russell Salisbury from the House and thanked them for their assistance (Attachment One).

A visitor registration sheet was circulated (Attachment Two).

Chairman Jordan and Senator Wells gave opening remarks and welcomed the committee.

Presentation One

Chairman Jordan recognized Renee Metz, Chief Counsel of the North Carolina Alcoholic Beverage Committee Control Commission to present a report on ABC permitting issues (Attachment Three). Ms. Metz reviewed the number of North Carolina permit-holders, cancellations (both voluntary and involuntary), and discussed the problems of being unable to determine why a particular permit is cancelled. Over ten years, only seven revocations took place per the ABC database, despite there being 17 ordered by Administrative Law Judges. If a business is on a temporary permit, they don't have their license revoked but instead are denied.

Ms. Metz explained that greater than 50% of summary suspensions, application rejections, and expired cases are overturned. Part of the reason is due to discrepancies between ABC laws in General Statutes Chapter 18B, which were created in 1981 with few changes since, (Attachment Four) and the Administrative Procedure Act Laws in 150B, which received numerous changes in 2011.



On December 17 OAH and the ABC Commission met to discuss ways to change these differences through policy. Judge Mann has offered to talk to his staff about summary suspension and steps the ABC Commission can take internally to fix these discrepancies and unclear language.

Ms. Metz goes into her own recommendations regarding clarifications on language that can be found on pages six through nine on Attachment Three.

Chairman Jordan opened the floor for questions.

Rep. Floyd asked why the ABC Commission collects leases for permit applications.

Ms. Metz responded that applicants must provide proof of legal right to the property they wish to hold a permit for.

Sen. Randleman stated that the Joint Legislative Oversight Committee on Justice and Public Safety (JPS) appointed a subcommittee to handle this issue, so she questioned this matter coming before APO.

Ms. Metz stated that the list of concerns and possible solutions was requested by Sen. Wells, co-chair of APO.

Rep. Jordan asked if this list has been provided to the JPS subcommittee.

Ms. Metz stated no, not yet.

Sen. Wells requested from Ms. Metz a list of her ideas, and for those ideas to be broken down into two lists: suggested changes, and what those changes should be so that the Committee may can discuss with rule makers. Sen. Wells also asked Ms. Metz to specify which problems stem from Chapter 18B. Sen. Wells stated it is not clear if changes should be made or if an entire new section of regulations should be written.

Rep. Jordan asked for examples of the different permits that are provided by the ABC Commission.

Ms. Metz responded that a typical restaurant may have an on premise malt beverage license, on premise unfortified wine license (standard table wine), possibly an on premise fortified wine license, and usually a mixed beverage restaurant license. A retailer such as a convenience store would have an off premise license(s). Breweries may have a brewery license and an on premise malt beverage license. The max number of licenses for one location the ABC Commission has seen at once has been nine licenses.



Rep. Jordan stated that Ms. Metz said there have been cancelations, but no understanding why, and wanted to know why that was unknown.

Ms. Metz explained that cancelations just go into the system, and that a significant number come in at one time so there was never a system to specify the reason for the cancelation.

Rep. Jordan asked if there has been thought by the agency whether that would be good information to have. Would it be more than simply adding a new field on a form? Do we know how much it would cost to implement this change?

Ms. Metz responded that the agency would benefit from having this knowledge. The ABC Commission has its own IT department, so Ms. Metz stated she can't imagine it would be that expensive to implement the necessary updates.

Rep. Hardister asked if permits were tracked as voluntary or involuntary.

Ms. Metz responded with no.

Rep. Hardister followed up by asking how clarified knowledge is currently defined.

Ms. Metz responded that they don't know, that's the Commission's problem.

Judge Mann explained he and Ms. Metz met a week ago, and discussed some of these problems. About 200 cases have been brought before the Office of Administrative Hearings, and all have received a decision. The Office of Administrative Hearings and ABC Commission have a long history of cooperation.

Rep. Jordan asked if Ms. Metz is aware of when the cap on administrative penalties was instated in general statutes, even though something like this should come through rulemaking.

Ms. Metz responded it was before 1998, but she was not aware of exactly when.

Rep. Jordan asked what clarification is needed for the 90 day temporary permit period.

Ms. Metz responded that they need to know what happens on day 91, once the 90 day temporary permit period is up. Is the permit expired? Does the applicant reapply? Sometimes the ABC Commission cannot complete an investigation within the 90 day period, where investigators go to the location to examine things like how many bathrooms are available, number of seats, etc. Ms. Metz would like to know what is supposed to occur if these investigations do not occur during the ninety day period.

Rep. Jordan asked if the current law does not allow extensions.



Ms. Metz responded correct, the Commission does not have that power.

Sen. Randleman asked how many applications are receive per month.

Ms. Metz responded that they get thousands, around fifty to one hundred per day, but that not all applications must be investigated as rigorously as others.

Sen. Randleman asked what percentage must be investigated.

Ms. Metz responded 60-70%. Salesmen don't need investigation like on site locations or grocers.

Sen. Randleman requested more information on these numbers.

Rep. Jordan added that only 60,000 permits exists, and asks how is this the case if 50-100 permits are being submitted per day.

Ms. Metz responds that some of these permits are canceled, and she'd like to investigate/discuss these numbers with her staff.

Sen Wells asked what the cost of an application is.

Ms. Metz responded \$400.00 for a beer and wine license, \$1,000.00 for a mixed beverage license, \$38.00 for a finger print card fee, and that an off-premise license would cost between \$800.00-\$1200.00 for beer and wine, and a mixed beverage license would cost anywhere from \$1200.00-\$1,500.00.

Rep. Floyd asked if that money stays with the Commission if a permit application is canceled.

Ms. Metz responded with yes, there are no refunds.

Presentation Two

Chairman Jordan recognized Mike Tadych, Counsel of the North Carolina Acupuncture Licensing Board, to give an update on the dry-needling cases (Attachment Five).

Mr. Tadych stated that due to the status of pending litigation, his responses could be limited. The Board is involved in two cases, and the first case that the Board is involved in is a State case. Defendants include Elizabeth Henry, Aart Schulkopper, and Jessan Hager, all Physical Therapists (PT). At Cornerstone Physical Therapy a physical therapist punctured a lung while performing dry needling (DN).



Mr. Tadych stated that dry needling is also known as trigger point therapy and/or intramuscular therapy, involves the insertion of solid filament needles through a patient's skin and muscle tissue up to four inches long. The Acupuncture Board believes that physical therapists are not qualified to perform dry needling, which they are currently performing after attending a weekend long extended education training class.

Mr. Tadych states that the American Board of Acupuncture requires 300 hours of training to 200 hours in formal study and 100 hours of clinical training, followed by a written examination to become a licensed acupuncturist.

Mr. Tadych went on to explain that in 2010 the Board of Physical Therapy determined that physical therapists could do dry needling. The Attorney General gave an advisory letter that the physical therapists could likely do dry needling, but the Boards' should determine a definition for dry needling. The Rules Review Commission rejected the definition brought by the Physical Therapy Board determined in 2014-- 54 hours of training due to the rules going beyond their statutory authority. The Board pulled the rule and then allowed physical therapists to perform dry needling. The Acupuncture Board then requested an injunction from a judge to stop the Physical Therapy Board from allowing dry needling to be performed by physical therapists. Shortly after this, multiple patients receiving dry needling from physical therapists sued the Acupuncture Board in federal court claiming violation of substantive due process.

The first case was dismissed due to procedural grounds and the Acupuncture Board was told that the statute that allowed the Board to seek an injunction was insufficient and ultimately they would need to go to the Physical Therapy Board for a declaration that dry needling is not physical therapy. They did that, and the Physical Therapist Board issued a declaratory opinion in July 2016 that dry needling is physical therapy and not acupuncture.

The Acupuncture Board took this case to the Supreme Court, and as of now the Physical Therapy Board has asked for an extension, which was granted until February 2018.

Mr. Tadych stated that the second lawsuit involves four physical therapists, multiple acupuncturists, and all current or past board members of the Acupuncture Board. The Acupuncture Board was sued due to antitrust and violations of substantive due process. As of July 2017 the Federal Court states that the case is pending resolution of the State case.

Chairman Jordan opened up the floor for questions, and stated that multiple documents have been added to the agenda by the physical therapy boards (Attachments six, seven, eight, nine, and ten).

Sen. Blue asked for clarification – dry needling is sticking a four-inch needle into the skin, and what are the current basic requirements to perform dry needling.



Mr. Tadych responded that dry needling is currently not taught in any physical therapy course, and that it is only a continuing education course. There are no examinations during this continuing education course.

Sen. Blue asked how Mr. Tadych would like the General Assembly to handle this situation.

Mr. Tadych responded that when the issue came out, the original goal was to seek an exemption, like the Chiropractor Board, where additional education/training would be needed.

Dr. Majebe said that in the state of North Carolina the Acupuncturists are medical practitioners. They must have an undergraduate degree before attending acupuncture school, which is a four year full time program. The first two years are on didactic studies, while the third and fourth year studies include an additional 1,000 hours of practice under a licensed acupuncturist. Rules from Physical Therapists proposed 54 hours of training in order to perform dry needling.

Sen. Robinson asked if there are institutions that license physical therapists, and how much additional training should these practitioners obtain in order to say they're safe to practice.

John Silverstein, attorney for the North Carolina Board of Physical Therapist examiners, answered by first stating he is not involved with this litigation, nor a physical therapist. Eighty-Six percent of the training that physical therapists get in basic education is the same as the acupuncture training. Physical therapists do not want to practice all of acupuncture, just dry needling like they have been performing since 2010, and that dry needling is simply an extension of deep tissue massage.

Sen. Robinson asked if there are any other procedures that physical therapists engage in that are similar to dry needling or require similar critical practice.

Mr. Silverstein responded that yes, it is not unusual for physical therapists to perform procedures that involve needle insertion into the skin. Currently in order to be a physical therapist you have to have 3 additional years past college. The scope of practice has expanded and dry needling is simply an advancement of deep tissue message.

Sen. Barrett responded that it appears the basic theory is that physical therapists shouldn't do this because they don't have the correct training and it is a safety issue.

Mr. Tadych responded that yes, there is no supervised clinical experience before they perform the procedure. The continuing education course does not include clinical training.

Sen. Barrett asked Mr. Tadych if he acknowledges that in the court system the Acupuncture Board has been unsuccessful.



Mr. Tadych responded that this is the reason for appellate courts - the judge failed to address all of their concerns, and that is why the Board has appealed. He explained that they have provided this Committee with readings and filings, and can continue to do so if that is helpful.

Sen. Barrett went on to say he understands there are procedural issues that lead to problems, but he assumed the Acupuncture Board is here from a public policy standpoint because they believe their group is safer performing this practice than the physical therapists.

Rep. Jordan asked if Mr. Tadych has data that would show the number of people performing this procedure, and if there is a higher number of problems with one group over the other.

Mr. Tadych responded that Current Procedural Terminology (CPT) codes to bill insurance don't allow a determination on which procedures are done by physical therapists, and whether it would include dry needling or not. Therefore the data is not readily available.

Sen. Barrett asked if there is national data related to Rep. Jordan's question.

Mr. Tadych responded that no, he does not have data and that with Health Insurance Portability and Accountability Act (HIPAA) issues, there may or may not be. He also reiterated that considering the coding issue with CPT codes, the data may not be discernable.

Sen Barrett directed his question to Mr. Silverstein and asked if he had any data to provide.

Mr. Silverstein responded that he does not want to misrepresent the Board. There is some data that can be found from the Judge's opinion in the case, so it is properly represented.

Rep. Hardister stated that it would be helpful if someone would provide data on what injuries are caused by these procedures.

Mr. Tadych responded that they can do their best, but they aren't sure what exists. They will search for data.

Sen. Wells, referring to financial statements (Attachments 11 and 12), stated that this shows there is an evaluation of -\$147,769.00 (page two Attachment twelve). Sen. Wells asked if this is an accurate evaluation of the Acupuncture Board.

Mr. Tadych responded that he doesn't know, he is the attorney not the Board auditor.

Sen. Wells followed up with the fact that another financial document submitted to this Committee shows an evaluation of -\$56,000.00 at the same time. Sen. Wells added that there are two documents showing a differing net worth.



Mr. Tadych responded again that he does not know why there is a difference, that Everett Gaskins Hancock Law Firm is the outside counsel. Mr. Tadych explained that the Board has accrued a substantial balance in attorney's fees, but there is an agreement of \$1,000.00/month until the debt is retired. The Board owes Mr. Tadych's firm substantially less.

Sen. Wells stated that in total the Board owes \$119,683.00 in attorney's fees.

Mr. Tadych responded that he is not familiar with this document, and asked to be shown where this figure was.

Sen. Wells responded page ten of document twelve.

Mr. Tadych responded that the legal debt according to these documents shows an additional accrual of \$20,000.00. Mr. Tadych could not tell what firms are owed what amount under these documents. Mr. Tadych believes they are taking \$500.00/month in legal fees. Mr. Tadych explained they have four agreements with the Acupuncture Board regarding payment plans. The firm bills hourly, and for some reason their financial person who departed in 2017 was not paying the Board attorney fee and management fee. When this was discovered the firm cleared everything up and currently nothing is owed.

Sen. Wells asked to confirm that Mr. Tadych is representing this Board and that Mr. Tadych's firm is the effective staff of that Board. Sen Wells stated that his big concern is \$336,000.00 was spent on legal fees, and that the Board's dues/fees income amount to only about \$112,000.00 in one year. Meaning, three times the yearly income was spent on legal fees.

Mr. Tadych responded that he is not sure where the \$336,000 figure came from, and that payments have been deferred – the balance is somewhere around \$120,000.00. Mr. Tadych was not sure where the \$336,000.00 figure came from. Mr. Tadych explained that payments have been deferred, and the balance is somewhere around \$120,000.00. Mr. Tadych's firm is owed substantially less.

Sen. Wells concluded that regardless, there are discrepancies and at the end of the day the Board is in a hole.

Mr. Tadych added that in respect to his firm, they are squared away.

Sen Wells stated that based on a Program Evaluation Division (PED) study on the cost of licensing in North Carolina, what we are charging practitioners is significantly higher than Virginia and South Carolina, by \$20 to 30 million. Things like this are adding to that cost, and this creates a barrier to entry in North Carolina. The only people coming out ahead with this are attorneys. Sen. Wells stated that North Carolina is a national poster child for licensing - in the



last six months. The Federal Trade Commission (FTC) has brought forth other issues than the Dental Board, and this may impact federal cases.

Rep. Floyd asked if the debt the Board was incurring would be put onto future people looking to become licensed.

Mr. Tadych responded that hopefully this will come to an end, and he hopes this emphasizes the importance they see in this issue. There have also been significant donations given to outside council to retire these legal fees. Licensing fees have not changed since the Board was created in 1992.

Rep. Floyd asked for an explanation on these needles that are four inches or more. Rep. Floyd asked if the needle goes in the skin or punctures the skin.

Mr. Tadych proceeded to show the Committee members an actual needle used in dry needling.

Dr. Majebe answered that the needles are put into the skin and sometimes deeply into the joint.

Sen. Wells stated that one of the biggest issues in this federal lawsuit is supervision. The Boards are going to the courts instead of the North Carolina General Assembly, which is supposed to be supervising them. If the Boards don't come to the General Assembly to resolve issues, then the only thing the General Assembly can do is raise or change fees. If the Boards are raising their own money then the General Assembly serves no purpose, and cannot actively supervise the Boards. Sen. Wells asked staff to look into this for the next meeting.

Presentation Three

Chairman Jordan recognized Garth Dunklin, Chair of the North Carolina Rules Review Commission (Attachment 13).

Mr. Dunklin gave an update on the Periodic Review of Rules, which was put into place by legislation five years ago. This requires agencies for rules to be reviewed and placed into one of three buckets: necessary with public interest, necessary without public interest, or simply unnecessary. This allows for unnecessary rules to be removed. Page five of attachment thirteen provides an update on the Rules Review process. Mr. Dunklin provided another document (Attachment 14) that dives deeper into the numbers provided in attachment 13.

Mr. Dunklin stated that most rules remain, with only 12.12% being removed. The Rules Review Commission still supports HB 162 (Amend Administrative Procedure Laws), sections one through three. They would like to take a closer look at section four, including consider defining what a "set of rules" is and clarify if the new proposed section applies to the rules re-adoption process.



Mr. Dunklin then went into an update on the NC State Board of Education v. The State of North Carolina and the North Carolina Rules Review Commission. The State Board of Education feels that they are exempt and do not fall under the definition of an agency and don't have to comply with Chapter 150B.

The Court of Appeals felt they didn't have authority over this case, sent it to the State Supreme Court, who then sent the case back to the Appellate Court. The Appellate Court then issued a decision that the State Board of Education does fall under the requirements. There was a single dissent, so the State Board of Education had the right to appeal to the State Supreme Court, which they did. The State Supreme Court entered orders on the case to put them on an expedited briefing schedule to be heard on the same day. February 7, 2018 both oral arguments will be argued before the Supreme Court with opinion to follow. Since this is an ongoing case Mr. Dunklin chose to reserve his opinions.

With no additional items or questions, Chairman Jordan adjourned the meeting at 2:45 PM.

Representative Jonathan C. Jordan
Presiding

Emma King, Committee Clerk

Attachments

1. Sergeant at Arms
2. Visitor Registration
3. ABC Commission and Administrative Procedures
4. General Statute 18B-901
5. North Carolina Acupuncture Licensing Board Presentation
6. Physical Therapy Attachment: Dry Needling Overview
7. Physical Therapy attachment: Declaratory Ruling
8. Physical Therapy attachment: Court Opinion
9. Physical Therapy attachment: Memorandum Opinion and Order
10. Physical Therapy attachment: Order and Opinion on Petition for Judicial Review



11. NC Acupuncture Licensing Bd Balance Sheet (2016)
12. NC Acupuncture Licensing Bd Balance Sheet (2017)
13. North Carolina Rules Review Commission Presentation
14. Periodic Review and Expiration of Existing Rules